

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 05-0297
SALES AND USE TAX
For Tax Period 2001-2002**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

Issue

I. Sales and Use Tax –Maintenance Agreements

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1. IC § 6-2.5-3-2; 45 IAC 2.2-4-2; Sales Tax Information Bulletin #2, issued November, 2000.
The Taxpayer protests the imposition of use tax on maintenance agreements.

II. Sales and Use Tax –Bariatric Beds and Equipment

Authority: IC § 6-2.5-5-18(b); 45 IAC 2.2-5-27(b).
The Taxpayer protests the imposition of use tax on bariatric beds and equipment.

III. Sales and Use Tax – Information Transferred by Compact Disc

Authority: IC § 6-2.5-3-2. Sales Tax Information Bulletin #8, February 9, 1990, and reissued May 2002.

The Taxpayer protests the imposition of use tax on information transferred by Compact Disc.

IV. Tax Administration-Imposition of Negligence Penalty

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).
The taxpayer protests the imposition of the negligence penalty.

Statement of Facts

The taxpayer is a long-term, acute-care hospital. Pursuant to an audit, the Indiana Department of Revenue, hereinafter referred to as the "Department," assessed additional use tax, interest, and penalty for the tax period 2001-2002. The Taxpayer also requested refunds of certain sales taxes that it had paid. The Department denied some of these requests for refund. The taxpayer protested some of the assessments and some of the denials of refund. A hearing was held and this Letter of Findings results.

I. Sales and Use Tax –Imposition on Maintenance Agreements

Discussion

Indiana Department of Revenue assessments are prima facie evidence that the tax assessment is correct. IC § 6-8.1-5-1(b). The taxpayer bears the burden of proving that the assessment is incorrect. Id.

Indiana imposes a sales tax on “retail transactions made in Indiana.” IC § 6-2.5-2-1. Use tax is imposed on the use of tangible personal property purchased in retail transactions in Indiana on which no sales tax was collected from the purchaser. IC § 6-2.5-3-2.

The Department assessed use tax on certain optional maintenance/service agreements for ventilators. The Taxpayer protested this assessment. The Taxpayer argued that after paying for the optional maintenance/service agreements, it decided not to purchase them. Therefore, it nullified the contract of sale. The Taxpayer presented credit invoices from the service provider demonstrating that the service provider credited the taxpayer’s account for the amount originally paid for the optional maintenance/service agreements. In effect, the Taxpayer returned the optional maintenance/service agreements. If the optional maintenance/service agreements were not purchased and used by the Taxpayer, there can be no imposition of use tax.

Finding

The taxpayer’s protest is sustained.

II. Sales and Use Tax –Imposition on Bariatric Beds and Equipment

Discussion

The Taxpayer paid sales tax on the rental of bariatric beds and other bariatric equipment. During the audit process, the Taxpayer requested a refund of the sales taxes paid on these items. The Department denied that request. The Taxpayer protested the denial.

Rentals of tangible property are described as retail transactions for purposes of sales and use tax. IC 6-2.5-4-10(a). Therefore, if no sales tax is collected on a rental transaction, use tax is due on the use of the tangible personal property leased in the rental transaction.

The Taxpayer contended that the bariatric beds and other bariatric equipment qualified for exemption from the sales tax pursuant to IC § 6-2.5-5-18(b) as follows:

Rentals of durable medical equipment and other medical supplies and devices are exempt from the state gross retail tax, if the rentals are prescribed by a person licensed to issue the prescription.

For the purposes of sales and use tax, the term “prescription” is defined in the Regulations at 45 IAC 2.2-5-27(b) as follows:

The term “prescribed” shall mean the issuance by a person described in paragraph 1 of this regulation of a certification in writing that the use of the medical equipment supplies and devices is necessary to the purchaser in order to correct or to alleviate a condition brought about by injury to, malfunction of, or removal of a portion of the purchaser’s body.

The Taxpayer argued that it qualified for this exemption because physicians wrote prescriptions for particular patients to use the bariatric beds and equipment. The prescriptions were written because the patients suffered from the disease of obesity. According to the definition of “prescribed” for sales and use tax purposes, the bariatric equipment could only be prescribed by a physician if the equipment were used to treat the medical condition of obesity. The bariatric beds and bariatric equipment were larger and sturdier. They stood up under the additional weight and stress of the obese patients. The bariatric beds and other bariatric equipment did not, however, have any therapeutic purpose. They did not aid in the alleviation or correction of the patients’ medical condition of obesity. Therefore, they could not be “prescribed” as that term is used for sales and use tax purposes.

The Taxpayer also requested a refund of sales tax paid on a therapeutic bariatric bed. This bed is document #1900001714 in stratum 4. The Taxpayer submitted documentation demonstrating that this bed was designed to help heal bed sores by relieving pressure from and providing air flow to the injured areas. This bed alleviated the patient’s medical condition of bed sores. This bed meets the sales tax definition of a “medical device prescribed by a physician.” This bed qualified for exemption pursuant to IC § 6-2.5-5-18(b).

Finding

The taxpayer’s protest to the denial of refunds is respectfully denied except for the claim for refund of sales taxes paid on the bed that also treated bed sores.

III. Sales and Use Tax –Imposition on Information Transferred by Compact Disc

Discussion

The Taxpayer purchased digital information on compact discs. The Taxpayer used this information to prepare pharmaceutical instructions for distribution to patients at the time of their release. The Department assessed use tax on the Taxpayer’s use of the information on compact discs pursuant to IC § 6-2.5-3-2. The Taxpayer argued that it actually purchased and used a non-taxable service rather than taxable tangible personal property.

The Department’s interpretation of the sales and use taxability of information purchased in an electronic format is found in Sales Tax Information Bulletin #8, February 9, 1990 and reissued in May 2002 as follows:

The sale of statistical reports, graphs, diagrams or any other information produced or compiled by a computer and sold or reproduced for sale in substantially the same form as it is so produced is considered to be the sale of tangible personal property unless the information from which such reports was

compiled was furnished by the same person to whom the finished report is sold.

Pursuant to these instructions, the Taxpayer would be purchasing a service if it owned information which the service provider reorganized for a fee and then returned in the newly organized format to the Taxpayer. In this case, the Taxpayer actually purchased pharmaceutical information that happened to be transferred by compact disc. Under the interpretation of Sales Tax Information Bulletin #8, the Taxpayer purchased tangible personal property. As such, the use of this information when sales tax was not collected at the time of transfer was subject to imposition of the use tax.

Finding

The Taxpayer's protest is respectfully denied.

IV. Tax Administration-Imposition of Negligence Penalty

Discussion

The Taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The Taxpayer provided substantial documentation to indicate that the negligence penalty does not apply in this situation.

Finding

The Taxpayer's protest is sustained.

KMA/BK/DK – December 1, 2006